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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.501 OF 2017

1. Sharad Mansukhlal Mutha (Died) PETITIONERS

1A) Mangala Sharad Mutha
Age – 68 years, Occ – Agriculture

1B) Nirmal Sharad Mutha
Age – 41 years, Occ – Agriculture

Both R/o 83, Maniknagar,
Nagar-Pune Road, Ahmednagar

2. Ms. Seema Sharad Mutha
Age – 40 years, Occ – Business

3. Mrs. Shilpa Sharad Mutha
Age – 43 years, Occ – Business

4. M/s Sharad Mutha Housing Development Ltd.,
A Company Registered under the Companies Act, 1956
and having its Registered office at
83, Maniknagar, Ahmednagar-Pune Road
Ahmednagar – 414 001

By its Directors:

(a) Mr. Ashok Bansilal Mutha
Age – 72 years, Occ – Business

(b) Mr. Mansukhlal Manikchand Mutha (Died)

All above are R/o 83, Maniknagar
Ahmednagar – Pune Road,
Ahmednagar, 414 1001

VERSUS

1. Excellent Constructions Private Ltd., RESPONDENT
A Company Registered under the
Companies Act, 1956 and having

its place of business / office address:
11, Indian Merchantile Insurance Building
3rd Floor, V. B. Gandhi Marg, Mumbai 400 023
Notice to be served on its Managing Directors

2. Mr. Zarip Khan Wali Khan (WP is dismissed against R-2)
Age – Adult, Occ – Business

R/o 1. Dinshwa House, 6th Floor,
Above Oriental Bank
Synagogue Street, Pune Camp,
Pune 411 001

2. 20/10 A1-Amin Co-op Housing Society Ltd.,
Salisbury Park, Pune 411 037

Notice to be served on both addresses.

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Mr. A. P. Bhandari h/f Mr. R. R. Sancheti, Advocate for petitioners
Mr. S. S. Gangakhedkar, h/f Mr. V. V. Kabade, Advocate for
respondent No.1
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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 23rd JUNE, 2022
PRONOUNCED ON : 7th SEPTEMBER, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with
the consent of the learned advocates for the parties.

2. This petition, filed under Article 226 and 227 of the
Constitution of India, challenges orders passed by learned 2nd
Joint Civil Judge, Senior Division, Ahmednagar, below Exhibits-

209 and 218 in Special Civil Suit No. 116 of 2002.

3. Respondent No.1 – original plaintiff filed Special Civil Suit No. 116 of 2002 against the petitioners/defendants for declaration, recovery of amount and for foreclosure of mortgage in respect of lands bearing survey No. 326/1 and 327 admeasuring 2 Hectare, 7 Are and 7 Hectare, 7 Are, respectively, which are corresponding Plots No. 245-390, as per lay out plan sanctioned, situated at village Bhingar, Taluka – Nagar, District – Ahmednagar.

4. The petitioners, being defendants, resisted the suit, by filing written statement, in short contending that Mr. Zarip Khan - respondent No.2 always accompanied Shri. Ramchand Bulchand, who treated him like his son. Respondent No. 2 - Zarip Khan had full power to deal in subject matter of loan between the petitioner and respondent No.1 and it was being looked after by respondent No.2. Emails, to that effect, were issued. It is pointed out that the suit has been properly and legally compromised by respondent No.2 under authority of respondent No.1. Respondent No.2 was the duly constituted power of attorney of Mr. Gautam Raye, who was holding power of attorney from Ramchand Bulchand, the Managing Director of respondent No.1. It is further contended that the copy of registered power of

attorney was also made available to the petitioners.

5. After defendant No.3 led his evidence, defendants No.1 to 4 filed application Exhibit-209 contending that they are producing copy of registered document executed between the plaintiff and Mayfair Builders, Pune on 6th October, 2001 at the office of Sub Registrar, Pune. The said copy was received by the defendants in December, 2015, however, the same was misplaced and, therefore, it could not be produced on record and since the said copy is recently found by the defendants and the said document is important for evidence purpose as it will help the petitioners to get justice, it was claimed that the said document may be permitted to be produced and the same be read in evidence.

6. By filing say, the application was opposed by the plaintiff. The Trial Court rejected the said application holding that there is no pleading about the said document in the written statement of the defendants. Though defendant No.3 has deposed about the release deed dated 6th October, 2001 between the plaintiff company and the Mayfair Builders and Developers, however, in the cross-examination, he has admitted that the said fact is not stated by him in his written statement. The Trial Court, therefore, held that the evidence given by the defendant is

beyond the pleadings and it is not acceptable, as per the provisions of the Indian Evidence Act. The Trial Court, therefore, rejected the application.

7. By filing application Exhibit-218, the defendants sought review of said order. By a reasoned order, application Exhibit-218 is also rejected. The petitioners, therefore, impugn the orders passed below Exhibit-209 and 218.

8. Heard learned advocate for the petitioners and learned advocate for respondent No.1.

9. Learned advocate for the petitioners assailed the impugned order contending that the release deed dated 6th January, 2001 is referred in the evidence of the petitioners. The Trial Court ought to have considered the relevancy and admissibility of the said document at the time of final decision of the suit. According to him, the basic foundation in respect of the said document is already there in the averments of the petitioners, in the written statement. By relying on Full Bench judgment of this Court in the case of "*Hemendra Rasiklal Ghia V/s Subodh Mody*" 2008 (6) *MhLJ* 886, he submits that the document which is inadmissible, can be admitted at any stage of the suit, reserving the decision on the objection, until final decision of the case. He, therefore,

submits that the impugned orders passed below Exhibits-209 and 218 are liable to be quashed and set aside and the application Exhibit-209 deserves to be allowed.

10. On the other hand, learned advocate for the respondent supported the impugned orders. He submits that since there is no pleadings in the written statement about release deed sought to be produced by the petitioner, the Trial Court has rightly rejected the said application Exhibit-209. He further submits that since no case for review was made out, the Trial Court was justified in rejecting the application Exhibit-218.

11. In the written statement filed by the petitioners, there is no averment in respect of the transaction between Mayfair Builders and plaintiffs / respondents No.1 and 2. So also there is no reference of the release deed dated 6th January, 2001, sought to be produced on record by the petitioners.

12. Though the petitioners have stated about the transaction between Mayfair Builders and the respondents and claimed that there is similar dispute between respondents and Mayfair Builders, about recovery of amount and the said dispute was compromised by Zarip Khan - respondent No.2 on the basis of the power of attorney issued in his favour and had executed

release deed in favour of Mayfair Builders on 6th October, 2001, in the affidavit of examination in chief, petitioner No.1 has categorically admitted that there is no such averment in the written statement.

13. Petitioner No.1 has candidly admitted in cross-examination that *"these averments are not stated by me in my written statement"*. Thus, evidence in respect of release deed dated 6th October, 2001 is beyond the pleadings of the petitioners. The Trial Court, therefore, has rightly rejected permission to the petitioners to produce release deed on record.

14. Since the document sought to be produced by the petitioners is beyond the pleadings of the written statement, the petitioners cannot be allowed to produce the said document and said document cannot be read in evidence.

15. In ***"Hemendra Rasiklal Ghia"*** (*supra*), The Full Bench framed two questions for decision -

"(a) At which stage, the objection to the admissibility and/or proof of document which may be produced or tendered should be raised' considered and decided by the Court,

(b) At which stage, an objection to the admissibility or relevance of evidence contained in the affidavit filed under Order XVIII, Rule 4 of Civil Procedure Code should be considered and decided by the Court,"

16. Both the questions are answered by the Full Bench as follows:

“80. In view of the above analysis of the statutory provisions and our discussion, we, accordingly, articulate our conclusions as follows:

Answer to Question A

As already noticed, (I) objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such objection must be judicially determined before it is marked as exhibit;

(ii) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit’

(iii) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on the question until final judgment of the case.

The Court trying the suit or proceedings as far as possible is expected to decide the admissibility or proof of document as indicated hereinabove. As we hav already added a word caution that while exercising discretion judiciously for the advancement of the cause of justice for the reasons to be recorded, the Court can always work out its own modality depending upon the peculiar facts of each case without causing prejudice to the rights of the parties to meet the ends of justice and not to give the handle to either of the parties to protract litigation. The aim should always be to prevent miscarriage of justice and expedite trial, which is the dire need of the time.

81. Answer to Question B

The objection to the admissibility or relevancy of evidence contained in the affidavit of evidence filed under Order XVIII, Rule 4 of Civil Procedure Code can be admitted at any stage reserving its resolution until final judgment in the case as held in Ameer Trading Corporation Ltd V/s Shapoorji Data Processing Ltd., (supra).”

17. In the facts of the present case, as the document sought to be produced is beyond the pleadings made in the written statement, this ratio would not assist the petitioners.

18. The Trial Court has given cogent reasons while rejecting the applications Exhibits-209 and 218. No case is made out by the petitioners to warrant exercise of extraordinary writ jurisdiction. Writ petition being devoid of substance is dismissed. Rule discharged. Interim relief stands vacated. No costs.

19. After pronouncement of the judgment, learned advocate for the petitioners seeks continuation of the stay granted by this Court on 8th March, 2017. Stay to continue for a period of four weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE

